

**pennsylvania**

DEPARTMENT OF TRANSPORTATION

www.dot.state.pa.us

April 29, 2019

Cherry Hill Construction, Inc.
Mr. Damon M. Petrillo, P.E.
8211 Washington Boulevard
Jessup, MD 20794

York County; SR 0083-040
Contract No. 62880
Assessment of CELD's & RULD's

Dear Mr. Petrillo:

This letter is a follow up to previous Department issued letters dated December 20, 2018 and February 14, 2019 regarding the Assessment of Construction Engineering Liquidated Damages (CELD's) and Road User's Liquidated Damages (RULD's), respectively.

As initially discussed at the Executive Level Meeting held on December 13, 2018, the accrued CELD's and RULD's for which CHC is liable under the contract have not been deducted from project estimates. The Department, while reserving all rights, as a courtesy to CHC and at CHC's request, refrained from withholding the accrued liquidated damages from estimate payments during the pendency of ongoing negotiations relating to certain outstanding disputes. Given that those negotiations appear to have broken down, the Department, in accordance with the contract, will withhold all liquidated damages for which CHC is liable under the contract from estimate payments otherwise due CHC.

This means, specifically, the accumulated CELD's for which CHC is liable under contract will be deducted from amounts due on all future estimates. CHC is liable for CELD's of \$5,825.00 for each day that any physical work remains uncompleted after the extended Project Completion Date of November 12, 2018. Through March 31, 2019, the CELD's total \$809,675.00 and are continuing to accrue at the above-stated daily rate.

In addition, the contract Special Provisions, as modified by Time Extension 1, provide that the Southbound On-Ramp Detour using Temporary Ramp O is not to exceed a maximum of 519 calendar days, subject to RULD's in the amount of \$4,885.00 per day. Temporary Ramp O was opened to traffic on September 8, 2017. The maximum duration of 519 days was exceeded starting on February 10, 2019. Through March 31, 2019, the RULD's total \$244,250.00 and continue to accrue at the above-stated daily rate.

As a further reminder, per the contract as also modified by Time Extension 1, CHC will be liable for additional RULD's at the rate of \$14,000.00 for each day in excess of 1,357 calendar days that the I-83 Northbound and Southbound Long-Term Speed Reduction remains in effect and I-83 is thereafter not open to unrestricted traffic in all lanes. The Long-Term Speed

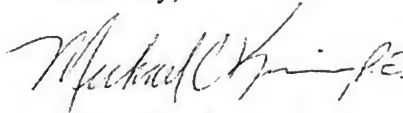
Mr. Petrillo
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Reduction was implemented on November 2, 2015 and, by contract, should end on July 20, 2019.

In summary, the Department will deduct all accumulated CELD's and RULD's from the amounts due CHC on all future estimates, effective immediately. As previously stated, the Department has not revised the extended Project Completion Date of November 12, 2018.

If you have any questions, please contact Vaughn N. Schlachter, P.E., District Construction Engineer, at 717-787-5070.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael C. Keiser, P.E.", with a stylized flourish at the end.

Michael C. Keiser, P.E.
District Executive

VNS/JPJ
(York SR 0083-040 CELD'd & RULD)



May 3, 2019

Michael C. Keiser, P.E.
District Executive
Pennsylvania Department of Transportation
Engineering District 8-0
2140 Herr Street
Harrisburg PA 17103-1699

Vaughn N. Schlachter, P.E.
District Construction Engineer
Pennsylvania Department of Transportation
Engineering District 8-0
2140 Herr Street
Harrisburg PA 17103-1699

**RE: York County; SR 0083-040
Contract No. 62880
Assessment of CELD's & RULD's**

Dear District Executive Keiser and Engineer Schlachter:

Cherry Hill Construction is in receipt of Mr. Keiser's letter dated April 29, 2019, regarding the above matter. This is our response.

In your April 29 letter, you have stated that the District is acting to impose liquidated damages in the amounts mentioned, and that the liquidated damages have accrued and will continue to accrue, and will be withheld from estimate payments otherwise due Cherry Hill Construction. You have stated that this is all in accordance with the contract. Your rationale for acting at this time seems to be expressed in your letter with these words: "Given that those negotiations appear to have broken down . . ."

Your position is very troubling to us, and we view your position as the District's reversing course on us in the midst of good faith discussions. And, of course, you did this at the same time that Cherry Hill was following normal contract change procedures. Here are the facts.

Cherry Hill encountered delays and disruptions not of our making during the Project, and we have been very specific in identifying them and very specific in seeking contract time extensions arising



from those delays/disruptions. Several meetings have been held between the District and Cherry Hill officials to address contract extensions.

On September 14, 2018 Damon Petrillo and I met with you (Mike Keiser) and your team. We discussed a 520 day extension. The District had no problem with granting a 500+ day extension, but the question that called for further discussion was “compensability” and “what was the per day cost” for a compensable day’s delay.

On December 13, 2018, Damon and I again met with you (Mike Keiser) and your team. At that time, we discussed a 505 day extension. Again, the District had no problem with granting a 500+ day extension, and again the question that called for further discussion was “compensability” and the “per day cost.” At this meeting, the District talked about a substantial completion date in December of 2019, and a final completion date on or about April 15, 2020. The discussion of a final completion date of April 15, 2020 would show that the District acknowledged 500+ day time extension.

Finally, Cherry Hill had a meeting with you (Mike Keiser) on March 12, 2019. Jack Frost (Tutor Perini Corporation, President/Chief Operating Officer, and Chief Executive Officer of Civil Group) and Damon were present for Cherry Hill (I was not available). Mike said that the District could offer 200+ days, plus about \$3 million, and perhaps would go to 500+ days in order to resolve Cherry Hill’s claims in the range of \$6 million. This was understood by Cherry Hill to be the District’s recognition of Cherry Hill’s entitlement to dollar damages and compensation for the balance of the 300+ days.

But then, an odd thing happened, and it originated on your end. Following the discussion for compensable days, you commented that (1) liquidated damages would be due, and (2) contractual default was a potential remedy available to the District. The whole conversation turned sour. The fact that both parties were making meaningful strides on a contract time extension, and then PennDOT began talking about imposing liquidated damages on the Project, made no sense to any of us on the Cherry Hill side.

We can only interpret the District’s words and behavior in the above meetings, together with its April 29 letter in this way. Cherry Hill believes that the District has deliberately chosen to walk-back from its established position that the District was agreeable to giving Cherry Hill a 500+ day contract time extension.

One other frustrating fact was that, on the one hand, you (Mike Keiser) informed Damon by an April 29 email that the District would suggest “potential dates” for a claim review meeting under our Notice of Claim by week’s end, and on the other hand, on that same day of April 29, we received your letter assessing liquidated damages. These are mixed messages.



Cherry Hill sees no rationale for any of this, except for us to interpret your April 29 letter assessing LD's as a threat in advance of your proposed meeting on our Notice of Claim. Cherry Hill finds this threat of assessing liquidated damages -- immediately in advance of your proposed meeting -- to be an exercise in bad faith negotiating. Let me explain.

As you are well aware, Cherry Hill, as a contractor, has chosen to pursue its only contractual remedy to address a contract dispute. Accordingly, it gave to the District its "Notice of Claim," dated April 24, 2019. This is the contractual procedure which contractors are supposed to follow in order to address disputes. It is your contract that requires it.

Your sudden decision to impose LD's was intentionally announced and visited upon Cherry Hill at the juncture of two events: (1) Cherry Hill's pursuit of its April 24, 2019 Notice of Claim, and (2) the District's reversal of its granting of 500+ days for entirely proper contract time extensions.

The District's simultaneous actions are threatening by their very nature, and they are contrary to your obligation to operate in good faith and fair dealing.

We ask you to note that our Notice of Dispute has laid the groundwork for discussions/negotiations in good faith, just as we are continuing to perform work on the Project in good faith.

Both our prior discussions with the District, as well as our Notice of Claim, have been pursued as a serious effort to express Cherry Hill's concern that the District did not timely address the changed conditions (the encountering of a subterranean water source) which resulted in a design change from the original contract plans at Structure 5 (Abutment 1) and Structure 6 (Connecting Wall). The original plans called for a spread footer design at this specified location, and the design was changed by the District after the District directed Cherry Hill to undercut below planned footer elevation, after which Cherry Hill encountered a subterranean water source, and thereafter struggled to control the uncontrolled water flow from the source.

Further, the District did not timely address the need for a jack and bore operation for a specific 24" drainage pipe which was called for under the plans to cross I-83 at about Station 171 + 60 Rt. The untimeliness delayed Cherry Hill's operations for the completion of embankment for Sediment Basin K-1 from the S1A 1 D Mass Excavation.

Further, the District did not timely address the changed conditions that Cherry Hill encountered at Ramp K, namely, the six month delay in excavation work as a result of existing debris within the mass excavation. The debris called for unusual operations to sort and dispose of unsuitable materials properly, and warranted a time extension.



Any of these problems, analyzed singly or together, warrant a contract time extension, and not the assessment of LD's. This can only be pursued through a Notice of Claim at this stage, and Cherry Hill is not responsible for "breaking down" negotiations by sending its Notice. To the contrary, it is acting responsibly.

Cherry Hill believes that your assessment of liquidated damages of the variety recited in your letter (1) does not take into account Cherry Hill's proper expectation (and the District's agreement) that Cherry Hill is entitled to a time extension, and (2) bears no reasonable relationship to the damages that the District has sustained, and (3) appears to be imposed as a penalty.

Cherry Hill is willing to discuss the Cherry Hill claims and the District's concerns, but it will not accept a threat to its contract revenues where the causes of delay originate with the District.

Very truly yours,

Henry Cheung

cc: C. Grainger Bowman, Esq.



COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE OF GENERAL COUNSEL

May 9, 2019

By email (HCheung@perini.com) and first class mail

Cherry Hill Construction, Inc.
8211 Washington Boulevard
Jessup, MD 20794

Attention: Henry Cheung, Sr. Vice President

**Re: York County
S.R. 0083-040
ECMS 62880**

Gentlemen:

This letter is written in response to yours of May 3, 2019, to Mr. Keiser and Mr. Schlachter. Because this matter has escalated to a point at which Cherry Hill Construction (CHC) has filed a formal claim with PennDOT's contracting officer it is now primarily a legal matter, so Mr. Keiser asked me to respond to your letter on PennDOT's behalf. Note that I am copying Mr. Bowman as a professional courtesy because he appears to be the attorney representing CHC in this matter. As an initial matter, please be advised that PennDOT reserves all rights and does not agree with any statements made in your letter unless such agreement is explicitly stated hereinafter.

CHC contends that the contract time should be extended by hundreds of days – the current demand is over 500 days – because of certain events that occurred fairly early in the project. CHC also contends that this time extension should be fully compensable. The current demand is somewhere in the \$20 million range, and CHC's demand has at all times been well in excess of \$10 million.

PennDOT disputes CHC's claimed entitlement to any time extension or delay compensation. It is PennDOT's position that any delays experienced on the project (other than any for which PennDOT has previously granted time extensions) are attributable to acts, events, matters, causes or things for which, as between CHC and PennDOT, CHC is fully responsible. Even if one were to make the assumption that PennDOT is responsible for project delay to the full extent maintained by CHC – an assumption that, PennDOT believes, is unsupported by the facts – the amount of delay compensation sought by CHC is grossly excessive.

A sharp dispute therefore exists between the parties. Despite its view of the merits of the positions being maintained by CHC, PennDOT, at CHC's request, has met with CHC (and/or Tutor Perini) representatives and discussed various scenarios as possible means of

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compromising the parties' dispute. It would have been irresponsible of PennDOT not to have done so. At no time during these discussions did PennDOT – or CHC, for that matter – make any admissions or concessions with respect to the issues in dispute. I have to believe that you understand this, notwithstanding some of the statements made in your letter of May 3, 2019.

As discussions continued, the contract completion date of November 12, 2018 – which had already been extended because of matters that are not involved in the ongoing dispute – came and went. The parties have agreed in the contract that CHC is liable for certain liquidated damages for failure to complete the project on time, as well as for other reasons. PennDOT may withhold liquidated damages due from current contractual estimate payments. CHC requested that PennDOT forbear from withholding liquidated damages due from current estimate payments because of the pendency of negotiations. As a courtesy, PennDOT, while reserving all rights, agreed.

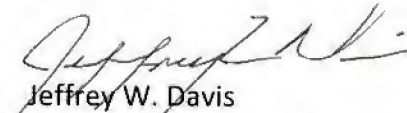
Given the extremely aggressive positions CHC staked out for itself from the beginning, an agreement to resolve the ongoing dispute appears, in retrospect, never to have been very likely. Still, as noted above, it would have been irresponsible for PennDOT not to have met and discussed matters as requested by CHC. Eventually, it became clear that additional discussions presented essentially no likelihood of a result that either party was willing to accept. Accordingly, CHC proceeded to present PennDOT with a more formal claim to the contracting officer, a step which, under the specifications and the Commonwealth Procurement Code, is the final prerequisite to the initiation of litigation before the Pennsylvania Board of Claims. PennDOT – as it reserved the right to do from the time the issue first came up – advised CHC that it intended to withhold from current estimate payments contractual liquidated damages that had accrued since the project completion date and continue to accrue.

CHC has presented a delay claim that is out of proportion to anything to which it might reasonably claim entitlement. It professed to want to negotiate but appears to have yielded little, if anything, in the negotiations that ensued. CHC now takes the position that PennDOT gave away major parts of its position by the very fact of its participation in the negotiations, and that it is "bad faith" for PennDOT to conclude (because the parties are miles apart) that the negotiations will not produce a mutually acceptable result and insist upon full enforcement of its contractual rights. Meanwhile, years after the events that are the subject of its pending claim, and six months after the project completion date, CHC devotes minimal resources to prosecuting the work and continues to allow the project schedule to slip. Your letter seems to

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indicate that CHC is, perhaps among other things, concerned – even preoccupied – with characterizing PennDOT's motives. PennDOT, for its part, is completely uninterested in impugning CHC's motives in relation to the ongoing dispute and committed to a full and fair resolution of the dispute on its merits. I hasten to add that PennDOT is even more committed to progressing toward project completion without any further undue delay, and it expects nothing less from its contractor going forward.

Sincerely,



Jeffrey W. Davis
Deputy Chief Counsel
Highway Construction & Claims Division

cc: Michael C. Keiser, P.E., Dist. Exec., Eng. Dist. 8-0 (email)
Vaughn N. Schlachter, P.E., Dist. Const. Eng'r, Eng. Dist. 8-0 (email)
Kevin Keefe, P.E., Construction Services Eng'r, Eng. Dist. 8-0 (email)
Jason M. Wolgemuth, Assistant Counsel (email)
C. Grainger Bowman, Esquire (regular mail & email)